Nos. ~~9 and 10~~

In the Supreme Court of the United States

OCTOBER TERM, 1956.

UNITED STATES OF AMERICA, PETITIONER

v.

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENT TO MOTION TO REMAND

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

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No. 9

UNITED STATES OF AMERICA, PETITIONER

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THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN, FRANK J. HUEBNER, AND HAROLD E. SULLIVAN

No. 10

THE SHOTWELL MANUFACTURING COMPANY, BYRON A. CAIN; FRANK J. HUEBNER, AND HAROLD E. SULLIVAN, CROSS-PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENT TO MOTION TO REMAND

The rapidly unfolding developments in this case require the filing of this supplement to the Government's motion to remand this case to the district court.

The principal purpose of this supplemental memorandum is to bring to the Court's attention the attached affidavit (Appendix, *infra*) of Frank J. Huebner, one of the three individual defendants in this case. The significance of Huebner's affidavit may

be understood from the following brief description of the background of the motion to remand: In 1952, the Shotwell Manufacturing Company and three of its responsible officers, Byron A. Cain, Frank J. Huebner, and Harold E. Sullivan, were indicted for wilful evasion of income taxes. Prior to the trial they moved that certain evidence be suppressed on the ground that it had been voluntarily disclosed to the Government in reliance upon Treasury Department policy. After a three-day pretrial hearing, the district court (Judge Nordbye) found that the disclosure was neither complete nor made in good faith, and denied the motion to suppress. The defendants were tried and convicted. On appeal, the Court of Appeals (Judge Lindley dissenting) reversed, holding that the disclosure was in good faith, that it was in complete compliance with the so-called voluntary disclosure policy, and that it was timely. Accordingly, the convictions were reversed with instructions to grant the motion to suppress.

In its petition for certiorari, filed October 1955, the Government contended that the court below erred in setting aside Judge Nordbye's finding that the defendants' alleged disclosure was incomplete and lacking in good faith. The petition for certiorari noted (p. 23) that Judge Nordbye specifically refrained from making a finding as to the timeliness of the disclosure, a question as to which the evidence before him was conflicting. The Government argued in its petition for certiorari that the case should at least have been remanded by the Court of Appeals to permit the trial court to pass upon this disputed issue of fact, if it were deemed significant.

Subsequent to the filing of the petition for certiorari, and as the result of an investigation initfated by the national office of the Internal Revenue Service early in 1955, additional evidence began to come to light. Such evidence, some of which has already been outlined in the motion to remand filed by the Government on November 15, 1956, indicates that the record now before this Court contains perjured testimony, both by defense witnesses and by Government witnesses, as to the circumstances of the alleged disclosure. In one aspect, the new evidence indicates that the officers of the Shotwell Manufacturing Company made no move to disclose the unreported corporate receipts until they discovered that the Treasury Department was already aware of them. Such evidence would unquestionably have a high degree of relevance on the issue of the timeliness of the disclosure, a matter left undecided by Judge Nordbye. In addition, it would strongly support Judge Nordbye's finding of fact that the disclosure was totally lacking in good faith.

Sullivan and Cain took the stand and testified, the former at the trial, the latter both at the suppression hearing and at the trial. Huebner never testified. He states in the attached affidavit (Appendix, *infra*, p. 10) that "I was not asked to testify at either the trial or suppression hearing because I had stated I would not lie on the stand."

Huebner's affidavit states that he has now voluntarily appeared before the grand jury which is investigating various facets of this case, and has testified before the grand jury "to these and other facts concerning the voluntary disclosure alleged to have been

made for and on behalf of The Shotwell Manufacturing Company". (Appendix, *infra*, p. 10) Huebner has also filed a motion in this Court to withdraw from opposition to the Government's petition for certiorari, and to consent to the Government's motion that the case be remanded to the district court.

On such remand, Huebner's testimony, as reflected in the attached affidavit, will contradict the testimony given by Sullivan and Cain on several crucial points: (1) Huebner states that the corporation received over-ceiling premium currency payments from Libbey during the period from November 1944 to December 1946. Sullivan and Cain testified (R. 2546-2550, 2650) that such payments were received only from September 1945 until the summer of 1946.[1] (2) Huebner states that he was never informed that a voluntary disclosure either had been made, or would be made, until the meeting at the Belden-Stratford Hotel in July 1948, and that he was then given to understand that it had been agreed that the date of the disclosure would be set at June 15, 1948. Cain and his accountant Busby testified (R. 176, 228-229) that a disclosure had been made to then Chief Deputy Collector Sauber as early as January 1948, and that Huebner had participated in the decision to make the disclosure.[2] (3)

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[1] This was the critical factual issue before the jury. Compare Petition for Certiorari (No. 9), page 14, with Brief of Respondents in Opposition, pages 5-6.

[2] Sauber, who had already committed himself in a written statement over a year before the suppression hearing (R. 3154), testified that the disclosure took place about March 15, 1948. Sauber has not been exonerated from perjury in this respect, as Sullivan and Cain assert in their Answer to the Motion to Remand (pp. 11, 26).

Huebner states that, after the Belden-Stratford meeting, he was informed by Cain and Busby that the corporation's case had been "fixed" and that it would be settled for a tax deficiency of only $20,000, but that someone in the revenue office destroyed the settlement papers.

The Government reiterates its belief that Judge Nordbye's finding that the alleged disclosure was totally lacking in good faith is abundantly supported by the facts already in the record, as summarized in the Government's petition for certiorari. We think that, on the record already made, the defendants' conviction was amply justified by the evidence and should have been affirmed on appeal. The new evidence which has come to light confirms and amplifies the inadequacies of the "voluntary disclosure" defense. In no sense is the Government moving, as the defendants assert, for "a partial new trial in order to validate a conviction already obtained." Rather, the Government requests a remand to the district court solely in order that the case should not be reviewed by this Court on the basis of a record which now clearly appears to contain perjured testimony and to be incomplete and inaccurate, on the timeliness, extent, and good faith of the alleged disclosure relied on by the defendants. We suggest that this Court may not desire to rule on the issues relating to the alleged disclosure on the basis of such a record, and that it would be in the interests of justice to remand this case to the district court for a full investigation and determination of the matters involved. Neither this Court nor the Court of Appeals is properly

equipped for the task of receiving and appraising testimony and evidence bearing on the controverted questions of fact. Ascertainment of where the whole truth lies with respect to the alleged disclosure is a function, we believe, for the trial court in the first instance.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JANUARY 1957.

APPENDIX

CITY OF CHICAGO,
County of Cook,
State of Illinois, ss:

AFFIDAVIT

Frank J. Huebner, being first duly sworn according to law, deposes and says:

I am one of the defendants in the case of *United States of America* v. *The Shotwell Manufacturing Company, Byron A. Cain, Frank J. Huebner, and Harold E. Sullivan,* which case is now pending before the Supreme Court of the United States on the petition of the United States for a writ of certiorari to the Court of Appeals for the Seventh Circuit. I did not testify as a witness at the trial of that case or at the hearing held on the motion of the defendants to suppress evidence.

During the years 1944 to May, 1952, I was Vice President and Plant Manager, in 1947 General Manager, of the Shotwell Manufacturing Company, Chicago, Illinois. I also was, and so far as I know still am, a director and officer of the Shotwell Manufacturing Company (now known as the Homan Mfg. Co., Inc.).

I know, from my own knowledge, that over-ceiling premium payments in currency were received by Shotwell from David G. Lubben during the period from November, 1944, to sometime in December, 1946, that none of these payments were recorded on Shotwell's books and that Cain and Sullivan were aware of these facts as they occurred. Cain and Sullivan

No. ~~1665~~ 10

In the Supreme Court of the United States

OCTOBER TERM, 1956

SAMUEL C. BRODY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington, D. C.

testified that these payments were received only during the period beginning in the late summer of 1945 and ending in July, 1946. I know of my own knowledge that this testimony was untrue.

During a period from about March, 1946 to about July, 1946, uninvoiced shipments of candy were made to Lubben by Shotwell. Payment for these shipments was made by or on behalf of Lubben in currency. So far as I know, none of the payments were recorded on the regular books and records of Shotwell or reported on the corporate income tax return for 1946. I was directed by Harold E. Sullivan, to make the uninvoiced shipments and to receive currency in payment for them. Byron A. Cain at about the same time also authorized me by telephone to pursue this procedure. Some of the uninvoiced shipments were made in the name of the ABC Candy Company, which was a fictitious and non-existent concern.

During the first six months of 1948, I had several conversations with Cain and Sullivan about the tax difficulties Lubben could get us into. At no time during that period did Cain, Sullivan or Leon J. Busby, the Shotwell accountant, mention to me that Shotwell had made a voluntary disclosure to the Internal Revenue Service, that it was contemplated a voluntary disclosure would be made, or that it would be claimed that a voluntary disclosure had been made.

Early in July, 1948, on Sullivan's instructions, I arranged a meeting at the Chicago Athletic Club with one Edward Urban of Close and Company, which also had black market transactions with Lubben. At the meeting, Sullivan discussed with Urban the possibility of forming a group to purchase Lubben's business interests in order that Lubben's books and records could be obtained. No mention of voluntary disclosure was made at the meeting.

In about the middle of July, 1948, I met with Cain, Busby and certain other Shotwell officials at the Belden-Stratford Hotel in Chicago, Illinois. We reconstructed all of the black market payments received from Lubben from 1944 through 1946 in the amount of about $389,000. Cain stated that the purpose of the meeting was to prepare figures so that a disclosure could be made to the Internal Revenue Service. The over-ceiling disbursement figures prepared by Cain to offset the black market receipts had no basis in fact but were taken out of thin air.

Prior to this meeting at the Belden-Stratford, so far as I know, no work was done by anyone relative to compiling data for the purpose of making a voluntary disclosure to the Government. I was given to understand that it had been agreed that the date of the disclosure would be set at June 15, 1948.

Sometime in late July, 1948, at Cain's request, I gave him $5,000.00 in currency and again in August, 1948, another $5,000.00 in currency. When he asked me for this money Cain told me he needed it to take care of and fix the tax difficulty we were in. He also stated that he and Sullivan did not have the cash and that they did not want to cash any checks because checks could be easily traced. Later, Cain told me he had turned the money over to someone to take care of a tax fix.

Cain also told me, sometime in about late July, 1948, that he was about to settle the tax case. Shortly thereafter, Cain told me he had settled the tax case for a tax deficiency of $20,000.00.

In October, 1948, Busby told me that there had been a meeting in the fraud division at the Internal Revenue office and that hell had broken loose; that some Internal Revenue people had a heck of a time destroying papers that had been made up for the purpose of billing Shotwell for taxes.

On November 13, 1952, Sauber testified at the hearing on the defendant's motion to suppress evidence that Busby and Cain had contacted him in March, 1948. After hearing Sauber testify, I told Cain I thought the voluntary disclosure date was supposed to be June 15, 1948. Cain said to me, "Ssshhh! There is nobody that knows anything about this. Keep quiet."

I was not asked to testify at either the trial or suppression hearing because I had stated I would not lie on the stand. I have testified voluntarily before the April 1956 Term Grand Jury, Northern District of Illinois, to these and other facts concerning the voluntary disclosure alleged to have been made for and on behalf of The Shotwell Manufacturing Company.

/s/ Frank J. Huebner.
FRANK J. HUEBNER.

Signed and sworn to before me this 19th day of December, 1956.

/s/ IRENE L. GOLDTHWAITE,
Notary Public.

My Commission expires 11-17-59.